

REDACTED DECISION – DOCKET NO. 10-433 PT

**By: GEORGE V. PIPER, ADMINISTRATIVE LAW JUDGE
SUBMITTED FOR DECISION ON AUGUST 1, 2012
DECISION ISSUED ON FEBRUARY 1, 2013**

SYNOPSIS

TAXATION -- PROCEDURE AND ADMINISTRATION -- It is the duty of the Tax Commissioner to see that the laws concerning the assessment and collection of all taxes and levies are faithfully enforced. *See* W. Va. Code Ann. §11-1-2 (West 2010).

WEST VIRGINIA OFFICE OF TAX APPEALS -- BURDEN OF PROOF -- In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment, the burden of proof is upon the Petitioner to show that any assessment of tax against it is erroneous, unlawful, void or otherwise invalid. *See* W. Va. Code Ann. § 11-10A-10(e) (West 2010); W. Va. Code. R. §§121-1-63.1 and 69.2 (2003).

BUSINESS FRANCHISE TAX -- IMPOSITION OF TAX -- In accordance with West Virginia Code Section 11-23-6(a), the annual business franchise tax is imposed on the privilege of doing business in the state and is collected on every domestic corporation, every corporation having a commercial domicile in this state and every foreign or domestic corporation owning or leasing real or tangible personal property or doing business in this state. *See* W. Va. Code Ann. § 11-23 6(a) (West 2010).

BUSINESS FRANCHISE TAX -- TAX BASE DEFINED -- The tax base of a taxpayer subject to business franchise tax is to be its capital as defined and adjusted in Section 3 of Article 23. *See* W. Va. Code Ann. § 11-23-4 (West 2010).

BUSINESS FRANCHISE TAX -- DEFINITION OF THE TERM CAPITAL -- SUBCHAPTER-S CORPORATION -- For an electing small business corporation, the term capital means the average of the beginning and ending year balances of the sum of the following entries from Schedule L of the Federal Form 1120S, which is prepared following generally accepted accounting principles as filed with the Internal Revenue Service for the taxable year to include the value of all common stock and preferred stock of the taxpayer; the amount of paid-in or capital surplus; retained earnings, appropriated and unappropriated; the amount of shareholders' undistributed taxable income; the amount of the accumulated adjustments account; the amount of the other adjustments account and less the cost of treasury stock. *See* W. Va. Code Ann. § 11-23-3(b)(2)(B) (West 2010).

BUSINESS FRANCHISE TAX -- AMOUNT OF CAPITAL ERRONEOUSLY REPORTED SUBCHAPTER-S CORPORATION -- Because Petitioner erroneously reported only \$____ as the average of the beginning and ending year balances of the value of its common stock rather than the value of that reported entries from Schedule L of the Federal Form 1120S, it

failed to comply with the tax reporting requirements of West Virginia Code Section 11-23-3(b)(2)(B).

BUSINESS FRANCHISE TAX – BURDEN OF PROOF NOT MET – The Petitioner has not met its burden of proof that the assessment against it was erroneous, unlawful, void or otherwise invalid. *See* W. Va. Code Ann. § 11-10A-10(e) (West 2010).

FINAL DECISION

A tax examiner with the Field Auditing Division of the West Virginia State Tax Commissioner's Office (Tax Commissioner or Respondent) conducted an audit of the books and records of the Petitioner, Company A. Thereafter, on October 6, 2010, the Director of the Field Auditing Division of the State Tax Commissioner's Office issued an assessment of business franchise tax against the Petitioner for the period of January 1, 2007 through December 31, 2009. The assessment was issued pursuant to the provisions of Chapter 11, Articles 10, 21, 23 and 24 of the West Virginia Code, and was for tax of \$____, interest of \$____, and additions to tax of \$____, for a total assessed tax liability of \$_____.

Written notice of the assessment was served on the Petitioner, as required by law.

Thereafter, by mail postmarked October 28, 2010, Petitioner timely filed with this Tribunal, the West Virginia Office of Tax Appeals, a petition for reassessment. *See* W. Va. Code Ann. §§ 11-10(A)-8(1) and 11-10A-9 (West 2010).

During the conduct of the first evidentiary hearing, Respondent requested that Petitioner's CPA, who filed both the West Virginia business franchise tax returns and the federal income tax returns, be present to testify in person, and that he bring with him both Schedule L's of the Federal Form 1120S for tax years 2007 and 2008.

On April 27, 2012, the hearing was reconvened; however, Petitioner failed to produce the witness or the requested documents. Whereupon, it was ordered that the hearing record be closed and that the matter would be submitted for decision after briefs were filed.

FINDINGS OF FACT

1. Petitioner is a Subchapter-S Corporation, which owns and operates a restaurant located in a West Virginia City in a County in West Virginia.

2. For West Virginia business franchise tax purposes, Petitioner reported the sum of \$5,000.00 as the average of the beginning and ending balances of the value of its common stock for tax years 2007, 2008 and 2009.

3. In conducting the audit, Respondent increased the value of Petitioner's common stock by \$_____ for the tax year 2007, \$_____ for tax year 2008 and \$_____ for tax year 2009. These adjustments corresponded with the amounts that Petitioner had reported on Schedule L on Federal Form 1120S as the beginning and ending balances of the value of its common stock for tax years 2007, 2008 and 2009.

4. The adjustments made by the Respondent were identical to Petitioner's own balance sheet entries, which were used to compile its financial statements for federal income tax purposes for tax years 2007, 2008 and 2009.

DISCUSSION

The sole issue for determination is whether the Petitioner properly reported, for business franchise tax purposes, all of its capital as required by West Virginia Code Section 11-23-3(b)(2)(B).

The annual business franchise tax is imposed on the privilege of doing business in the state and is to be collected on every domestic corporation, every corporation having a commercial domicile in this state and every foreign or domestic corporation owning or leasing real or tangible personal property or doing business in this state.¹

¹ See W. Va. Code Ann. § 11-23-6(a).

Pursuant to West Virginia Code Section 11-23-4, the tax base of a taxpayer subject to business franchise tax is to be its capital as defined and adjusted in Section 3 of Article 23, unless that taxpayer is also taxable in another state, which would then require that the capital be apportioned. *See* W. Va. Code Ann. § 11-23-4 (West 2010).²

In West Virginia Code Section 11-23-3(b)(2)(B), the capital of a taxpayer is defined as follows:

(B) S-Corporations. – In the case of an electing small business corporation, the average of the beginning and ending year balances of the sum of the following entries from Schedule L of Federal Form 1120S, prepared following generally accepted accounting principles and as filed by the taxpayer with the Internal Revenue Service for the taxable year:

- (i) The value of all common stock and preferred stock of the taxpayer;
- (ii) The amount of paid-in or capital surplus;
- (iii) Retained earnings, appropriated and unappropriated;
- (iv) The amount of shareholders' undistributed taxable income;
- (v) The amount of the accumulated adjustments account;
- (vi) The amount of the other adjustments account; and
- (vii) Less the cost of treasury stock.³

W. Va. Code Ann. § 11-23-3(b)(2)(B) (West 2010).

At the first evidentiary hearing, Respondent submitted into evidence as State's Exhibit 3, Petitioner's 2009 Schedule L of the Federal Form 1120S, showing that the Petitioner had reported for federal income tax purposes, the beginning and ending balances of its common stock as being \$400,000.00 and \$300,000.00, respectively. However, when Petitioner filed its 2009 West Virginia business franchise tax return, it listed the average of the beginning and ending balances of its common stock as only \$____. State's Exhibit 3 also reflected that Petitioner's

² No evidence was presented that the taxpayer was also taxable in another state.

³ On Petitioner's 2009 Business Franchise Tax Return total taxable capital is to be reported on Line 16 of Schedule B, which in turn is to be entered on Line 6 on the front of the return.

own balance sheets for tax years 2007 and 2008, which it used to prepare its financial statements to report federal income tax listed the sum of \$____ as the value of its common stock. The financial statement prepared for tax year 2009 valued its common stock at \$_____.

The submitted documents revealed that although West Virginia Code Section 11-23-3(b)(2)(B) required Petitioner to report the beginning and ending year balances of its common stock consistent with the amounts reported for federal income tax purposes, Petitioner failed to do so for all three of the tax years in question.

Because Petitioner failed to comply with the tax reporting requirements set forth in West Virginia Code Section 11-23-3(b)(2)(B) the assessment must be affirmed in toto.

CONCLUSIONS OF LAW

1. It is the duty of the Tax Commissioner to see that the laws concerning the assessment and collection of all taxes and levies are faithfully enforced. *See* W. Va. Code Ann. § 11-1-2 (West 2010).

2. In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment, the burden of proof is upon the Petitioner to show that any assessment of tax against it is erroneous, unlawful, void or otherwise invalid. *See* W. Va. Code Ann. § 11-10A-10(e) (West 2010); W. Va. Code. R. §§ 121-1-63.1 and 69.2 (2003).

3. In accordance with West Virginia Code Section 11-23-6(a), the annual business franchise tax is imposed on the privilege of doing business in the state and is collected on every domestic corporation, every corporation having a commercial domicile in this state and every foreign or domestic corporation owning or leasing real or tangible personal property or doing business in this state. *See* W. Va. Code Ann. § 11-23-6(a) (West 2010).

4. The tax base of a taxpayer subject to business franchise tax is to be its capital as defined and adjusted in Section 3 of Article 23. *See* W. Va. Code Ann. § 11-23-4 (West 2010).

5. For an electing small business corporation, the term capital means the average of the beginning and ending year balances of the sum of the following entries from Schedule L of the Federal Form 1120S, which is prepared following generally accepted accounting principles as filed with the Internal Revenue Service for the taxable year to include the value of all common stock and preferred stock of the taxpayer; the amount of paid in or capital surplus; retained earnings, appropriated and unappropriated; the amount of shareholders' undistributed taxable income; the amount of the accumulated adjustments account; the amount of the other adjustments account less the cost of treasury stock. *See* W. Va. Code Ann. § 11-23-3(b)(2)(B) (West 2010).

6. Because Petitioner erroneously reported only \$____ as the average of the beginning and ending year balances of the value of its common stock rather than the value of the reported entries from Schedule L of the Federal Form 1120S, it failed to comply with the tax reporting requirements of West Virginia Code Section 11-23-3(b)(2)(B).

7. The Petitioner has not met its burden of proof that the assessment against it was erroneous, unlawful, void or otherwise invalid. *See* W. Va. Code Ann. § 11-10A-10(e) (West 2010).

DISPOSITION

Wherefore, it is the **FINAL DECISION** of the West Virginia Office of Tax Appeals that the business franchise tax assessment against the Petitioner for the period of January 1, 2007 through December 31, 2009, for tax in the amount of \$____ interest in the amount of \$____ and additions to tax of \$____, totaling \$____, should be and is hereby **AFFIRMED**.

Interest continues to accrue on the unpaid tax until this liability is fully paid pursuant to the West Virginia Code Section 11-10-17(a).

WEST VIRGINIA OFFICE OF TAX APPEALS

By: _____
George V. Piper
Administrative Law Judge

Date Entered